STATE OF MICHIGAN

COURT OF APPEALS

CITY OF HUNTINGTON WOODS, Plaintiff-Appellee,	UNPUBLISHED May 10, 2012
v	No. 301987 Oakland Circuit Court
ORCHARD, HILTZ & MCCLIMENT, INC., Defendant-Appellant.	LC No. 07-087352-CZ

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Defendant, Orchard, Hiltz & McCliment, Inc., (OHM), appeals as of right the October 22, 2010, order of judgment in favor of plaintiff, City of Huntington Woods. OHM also appeals the December 21, 2010, order that denied its motions for judgment notwithstanding the verdict (JNOV), for a new trial, or for remittitur. Because we conclude that Huntington Woods failed to present a prima facie case of professional malpractice, we reverse and remand for entry of judgment in favor of OHM.

This case involves the reconstruction and rehabilitation of Coolidge Highway (the highway) between Ten Mile and Eleven Mile Roads in Oakland County. The city of Oak Park has jurisdiction over the western two lanes of the highway, while Huntington Woods has jurisdiction over the eastern three lanes. Oak Park decided to reconstruct its lanes, but Huntington Woods only requested a "mill and fill" of its lanes. OHM entered into two contracts with Oak Park with regard to the project. In the first contract, OHM agreed to provide design engineering services, in part, for the rehabilitation of the eastern three lanes of Coolidge Highway. In the second contract, OHM agreed to construction engineering services for the rehabilitation and reconstruction of Coolidge Highway. Under this contract, OHM was to provide "construction inspection," which was "limited to the visual observation of material and construction methods to be used in the work for compliance with contract specifications." Mark Loch, a licensed professional engineer and an employee of OHM, was the engineer primarily responsible for the project. The final plans and specifications prepared by Loch specified that a 70/22 binder was to be used in the asphalt, that a representative of the manufacturer of the geogrid material was to be available when the material was installed, and that a seasonal suspension of paving was to occur from November 14 to April 16. The plans and specifications required a change order for any change from the plans.

In November 2007, Huntington Woods sued OHM. In the count against OHM entitled "breach of OHM contracts," Huntington Woods alleged that it was the intended beneficiary of the contracts that OHM signed with Oak Park. It further alleged that OHM "breached the OHM contracts by providing negligent design or negligent inspection or supervision of the contractor, subcontractors, material men and/or suppliers and/or negligent testing of materials resulting in defective pavement in the Huntington Woods portion of the Project . . ." OHM asserted that a review of the allegations in the complaint revealed that Huntington Woods' claim against OHM was really a claim of professional negligence. OHM noted that Huntington Woods did not allege that OHM breached any particular provision of the contracts but, rather, that OHM breached the inherent obligation in the contracts to provide reasonably prudent engineering services. The trial court agreed, finding that although the count in the complaint against OHM was titled as a breach of contract claim, the allegations were for professional negligence. A jury returned a verdict in favor of Huntington Woods.

On appeal, OHM argues that the trial court erred in denying its motion for directed verdict and its motion for JNOV. According to OHM, Huntington Woods failed to present expert testimony that established the standard of care or that OHM breached the standard. OHM also claims that Huntington Woods failed to present expert testimony that any breach of the standard of care was the cause of Huntington Woods' damages.

We review de novo a trial court's decision on a motion for directed verdict, *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 131; 666 NW2d 186 (2003), as well as a trial court's decision on a motion for JNOV, *Freed v Salas*, 286 Mich App 300, 322; 780 NW2d 844 (2009). A directed verdict is appropriate when there is no factual question on which reasonable minds could differ. *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000). We must "view[] the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grant[] that party every reasonable inference, and resolve[] any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Id.* at 643-644. A party is entitled to JNOV when the evidence, viewed in favor of the nonmoving party, fails to establish a claim as a matter of law. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004).

To establish a prima facie case of negligence, a plaintiff must prove the following four elements: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; (3) the plaintiff was injured; and (4) the defendant's breach caused the plaintiff's injuries. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "A malpractice claim requires proof of simple negligence based on a breach of a professional standard of care." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994), abrogated on other grounds *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004). In a professional malpractice action, expert testimony is generally required to establish the standard of care, breach of the standard, and causation. *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994); *Phillips*, 204 Mich App at 409. Only where the claimed negligence is a matter of common knowledge and interpretation or where negligence can be inferred through the doctrine of res ipsa loquitur is expert testimony not required. *Phillips*, 204 Mich App at 409-410; *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). A bad result, in and of itself, is not evidence of negligence sufficient to raise a question for the jury. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005).

According to OHM, although the evidence may have established that it did not strictly comply with the final plans and specifications for the rehabilitation of Coolidge Highway because the highway was paved after November 14, 2001, and a 64/28 binder was used in the asphalt, there was no expert testimony that the standard of care required written change orders before an engineer could modify a mandated binder or paving date. Similarly, OHM asserts that there was no expert testimony that it breached the standard of care by using the 64/28 binder and paving Coolidge Highway on November 18, 2001.

"Professional negligence" is defined by M Civ JI 30.01 as the following:

> [T]he failure to do something which a [name profession] of ordinary learning, judgment or skill in [this community or a similar one] would do, or the doing of something which a [name profession] of ordinary learning, judgment or skill would not do, under the same or similar circumstances[.]

Expert testimony in a malpractice action must be based on how a similarly-situated professional would act. *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255, 259-260; 377 NW2d 313 (1985).

Here, there was no expert testimony that OHM breached the standard of care simply by paving Coolidge Highway on November 18, 2001. Likewise, there was no expert testimony that OHM breached the standard of care simply by using a 64/28 binder in the asphalt. In other words, there was no testimony that a licensed professional engineer of ordinary learning, judgment, or skill would not have paved Coolidge Highway on November 18, 2001, or would not have used a 64/28 binder. And, Huntingon Woods' argument on appeal implicitly reflects the lack of such testimony. To establish that OHM committed professional malpractice, Huntington Woods relies on OHM's failure to comply with the final plans and specifications. Huntington Woods claims that, as articulated by numerous witnesses, the standard of care required OHM to follow the plans and specifications and that OHM breached the standard when it failed to follow them.

The testimony of Huntington Woods' experts established that the standard of care required OHM to follow the final plans and specifications. For example, Timothy Germain, a licensed professional engineer, testified that "[t]he firm or individual responsible for the construction engineering must follow the plans and specifications as the design was prepared. It's critical." Similarly, Douglas Coleman, also a licensed professional engineer, testified that the job of the construction engineer is to ensure that the general contractor builds the road in accordance with the plans and specifications.

It is undisputed that OHM did not construct Huntington Woods' three lanes of Coolidge Highway in strict compliance with the final plans and specifications. Coolidge Highway was paved on November 18, 2001, and a 64/28 binder was used in the asphalt. The testimony established that an engineer must follow the final plans and specifications. OHM, without issuing change orders, allowed Coolidge Highway to be paved after November 14, 2001, and used a 64/28 binder in the asphalt. However, there was no expert testimony that OHM's conduct constituted an actual breach of the standard of care. *Dean*, 205 Mich App at 550 (stating that expert testimony is generally required to establish a breach of the standard of care in a

professional malpractice action). There was no expert testimony that defendant's failure to issue a change order to pave Coolidge Highway on November 18, 2001 -- a day which no expert witness opined was unsuitable for paving -- fell below the conduct required of an engineer of ordinary learning, skill, and judgment. Similarly, there was no testimony that OHM's use of the 64/28 binder -- a binder which no witness said was unsuitable for use on Coolidge Highway -- without obtaining a change order fell below the conduct required of an engineer of ordinary learning, skill, and judgment. Because there was no expert testimony regarding whether OHM's actual conduct fell below the standard of care, the jury was left to speculate whether OHM's failure to strictly comply with the final plans and specifications fell below the standard of care. And, whether an engineer is negligent for failing to strictly comply with the plans and specifications is not within the common knowledge of lay people. Accordingly, even when the evidence is viewed in the light most favorable to Huntington Woods, the evidence fails to establish a factual question whether OHM breached the standard of care. *Thomas*, 239 Mich App at 644. Because there is no factual question regarding whether OHM breached the standard of care, the evidence fails to establish Huntington Woods' professional malpractice claim as a matter of law. *Craig*, 471 Mich at 77.

Huntington Woods also asserts that OHM failed to comply with the final plans and specifications when a representative of the manufacturer of the geogrid material was not present when the material was placed on Coolidge Highway. Huntington Woods has interpreted the requirement as meaning that the representative must have been physically present on Coolidge Highway. However, other than Loch, no witness testified regarding this requirement. Loch testified that the requirement only meant that a representative had to be available for consultation. In addition, there was no expert testimony that the standard of care required Loch to consult with the representative regarding any problem that arose when the geogrid material was installed. Because of the scarcity of testimony regarding the geogrid material, there is no factual question about the geogrid material on which reasonable minds could differ. The evidence provides no basis to conclude that OHM's conduct regarding the geogrid material fell below the standard of care.

Additionally, proof of causation requires cause in fact and proximate cause. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Id.* "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the action or omission was *a* cause." *Craig*, 471 Mich at 87 (emphasis in original). The facts must support a logical sequence of cause and effect. *Id*. While the evidence need not negate all other possible causes, the evidence must exclude other reasonable hypotheses with a fair amount of certainty. *Id.* at 87-88. Proximate cause, or legal causation, "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

In arguing that the evidence established that the paving of Coolidge Highway on November 18, 2001, caused the deterioration of the highway, Huntington Woods cites the

testimony of Germain and James Berry, a licensed professional engineer.[1] Berry testified that the "late paving" impacted the condition of Coolidge Highway and that 4C mixtures have "durability issues" if paved late in the year. However, Berry never specified how the deterioration of Coolidge Highway was caused by the highway being paved on November 18, 2001. He never linked the deterioration of Coolidge Highway with the late paving date. Similarly, although Germain testified generally that "cold weather" can cause segregation, he never testified regarding the weather conditions on November 18, 2001, nor did he testify that the weather conditions existing on November 18, 2001, caused segregation. Under these circumstances, the testimony of Germain and Berry does not set forth specific facts that allow a reasonable inference of a logical sequence that the paving of Coolidge Highway on November 18, 2001, caused the deterioration of the highway. *Craig*, 471 Mich at 87.

In arguing that the evidence established that the use of the 64/28 binder caused the deterioration of Coolidge Highway, Huntington Woods relies on the testimony of Coleman.[2] Coleman testified that a 70/22 binder would have helped in "the aggregate adhesion," meaning that if a 70/22 binder was used the aggregate would have stuck together better and that some of the raveling "might have" been reduced. Coleman also agreed with a report that the "likely" cause of the raveling was "low binder (bitumen) content or a binder aggregate adhesion problem such as stripping, or some combination of both." Coleman's testimony that the 70/22 binder "might have" reduced the raveling, or his agreement with the conclusion that the "likely" cause of the raveling was low binder content or a binder aggregate adhesion problem, is not sufficient to establish causation. See *Craig*, 471 Mich at 87 ("It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries.") (emphasis in original). In addition, Coleman's testimony that the aggregate would have stuck together better had a 70/22 binder been used is not sufficient to raise a factual issue regarding whether the 64/28 binder caused plaintiff's damages. Coleman did not testify that Coolidge Highway would not have deteriorated as it did if the 70/22 binder had been used. The step from Coleman's testimony that the aggregate would have held together better had a 70/22 binder been used to the conclusion to the conclusion that Coolidge Highway would not have deteriorated had the 70/22 binder been used is a step that is not supported by expert testimony. Accordingly, the testimony of Coleman does not set forth specific facts that allow a reasonable inference of a logical sequence that the use of the 64/28 binder caused the deterioration of Coolidge Highway. *Craig*, 471 Mich at 87. Huntington Woods failed to present expert testimony that OHM's actions were a cause of its damages.

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[1] Huntingon Woods also relies on the fact that the Oakland County Road Commission did not pave Pontiac Trail with the 4C mixture used on Coolidge Highway until June 2002. However, Scott Hubbard, an engineering inspector for the road commission, never testified that the temperature on November 18, 2001, was too cold for paving. Hubbard provided no explanation for why the road commission paved Pontiac Trail with a 3C mixture on November 11, 2001, but then waited until June 2002 to pave the road with the 4C mixture.

[2] Huntington Woods also relies on the testimony of several witnesses concerning the traffic volume of Coolidge Highway. However, none of this testimony, when read in context, establishes that the use of the 64/28 binder was a cause of the deterioration of the highway.

In conclusion, Huntington Woods failed to present expert testimony that OHM's failure to comply with the final plans and specifications was a breach of the standard of care or was a cause of its damages.[3] Accordingly, defendant was entitled to a directed verdict or JNOV. We reverse the order of judgment and remand for entry of judgment in favor of defendant.

Reversed and remanded for entry of judgment in favor of defendant. Jurisdiction is not retained.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio

[3] Because of our conclusion that Huntington Woods failed to present a prima facie case of professional malpractice, we need not address the remaining issues presented by OHM.